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No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), on which the decision below relied, the Ninth Circuit held that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" under 8 U.S.C. 1101(a)(43)(G). This Court granted certiorari to decide whether that holding is correct. See Pet. I. Respondent now concedes that it is not. Br. 5. He instead contends that the California vehicle-theft statute is broader than the generic definition of "theft offense," not because the former reaches aiding and abetting and the latter does not, but for three *other* asserted reasons: (1) the California statute reaches a limited class of aiders and abettors under a "natural and probable consequences" theory and the generic definition does not; (2) the California statute reaches accessories after the fact and the generic definition does not; and (3) the California statute reaches thefts in which the defendant intends to deprive the owner of his property temporarily and the generic definition does not. As explained below, each of those contentions lacks merit.

A. The Fact That The California Statute Covers A Limited Class Of Aiders and Abettors Under A "Natural And Probable Consequences" Theory Does Not Preclude A Finding That Respondent Was Convicted Of A "Theft Offense"

Respondent contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because (a) a defendant in California can be guilty of aiding and abetting an additional crime committed by the principal that is a "natural and probable consequence" of the crime the defendant intended to aid and abet and (b) the "natural and probable consequences" rule is assertedly not followed by the

majority of States and therefore not part of the "generic" aiding-and-abetting component of a generic "theft offense." Br. 15-27; accord Cal. Pub. Defenders Ass'n (CPDA) Amicus Br. 14-17; Professors of Crim. Law (Law Professors) Amicus Br. 19-26. Respondent is mistaken.

1. In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that the "generic" definition of "burglary" in 18 U.S.C. 924(e) is the "sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598; accord *id.* at 589. The Court did *not* say, however, that a particular State's criminal statute satisfies that generic definition only if the law of that State reflects the majority rule with respect to every conceivable legal issue that might arise under the statute. Instead, the Court made clear that a state statute need only have the "basic elements" of the generic definition, and need only "substantially correspond[]" with it. *Id.* at 599, 602.

The Second Circuit employed that common-sense approach in *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992). In addition to holding that the generic definition of "arson" includes aiding and abetting, *id.* at 610-611; see U.S. Br. 16, the court held in that case that "minor variations in a state's arson statute are of no consequence provided that the state's statute *essentially corresponds in substance* to the generic definition of the crime," 949 F.2d at 611 (emphasis added). The court therefore concluded that the Vermont statute satisfied the generic definition even though its monetary threshold of property damage for arson was "toward the lower end of the * * * scale" among the States. *Ibid.*

That approach makes sense in assessing state statutes under *Taylor* and the Immigration and Nationality Act (INA) because, under "Our Federalism," there will almost always be some variation in the law among the States. Congress pre-

sumably recognized that States have the primary role in dealing with crime and that the details of state criminal laws can and should vary. And when Congress assigned federal-law consequences to prior state criminal convictions, it could not have intended that an alien would be able to avoid being classified as an aggravated felon simply by pointing to one aspect of the law of the State in which he was convicted that reflects the minority view. Nor could it have intended to require an immigration judge (IJ), the Board of Immigration Appeals (BIA), and the reviewing court to conduct a 50-State survey in each case on every wrinkle of a particular State's criminal law. The "aggravated felony" provision must be interpreted in a workable manner, because "Congress clearly intended to facilitate an efficient removal process, especially in aggravated felony cases." *Conteh* v. *Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006). Going beyond the "basic elements" would be particularly problematic in determining the "generic" meaning of aiding and abetting, because every criminal statute can be violated by aiding and abetting, and the "generic" meaning thus potentially affects the definition of every aggravated felony.

As respondent acknowledges (Br. 16-17), the "basic elements" of "generic" aiding and abetting are (1) assisting in the commission of a crime (2) with the intent to promote or facilitate its commission. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2 at 337 (2d ed. 2003) (LaFave). Because that is the law in California, *e.g.*, *People* v. *Celis*, 46 Cal. Rptr. 3d 139, 142 (Ct. App. 2006), it applies the "generic" version of aiding and abetting. And it does so regardless of whether California is in the majority or minority with respect to the narrow question of aiding-and-abetting law on which respondent focuses: whether foreseeability is sufficient, or some other mens rea is necessary, in the limited category of cases involving an aider and abettor's liability for a crime

committed by the principal that is different from the one he intended to aid and abet. A contrary approach would render the basic framework of *Taylor* unworkable by allowing a remote prospect—that an alien who pleaded guilty to a crime was, in fact, guilty only under a particular species of aiding-and-abetting liability—to permit an alien to escape the consequences of a conviction, even though it is overwhelmingly likely that he was guilty as a principal (or as a typical aider and abettor).

2. Even if the "natural and probable consequences" rule were relevant in determining the "generic" meaning of aiding and abetting, respondent's contention would still lack merit, because "generic" aiding and abetting encompasses that rule. "Natural and probable consequences" was the rule at common law; contrary to respondent's contention (Br. 21), it is the majority rule in the States; and it is the rule in federal courts.

a. In *Taylor*, this Court held that the term "burglary," as used in 18 U.S.C. 924(e) to identify past convictions that subject defendants to an enhanced sentence, is not confined to burglary as defined at common law, but instead has an expansive "generic" definition whose basic elements are drawn from the modern criminal codes of the States. The Court reasoned that Congress presumably intended to *include* common-law burglary, but also intended a definition that did not depend on common-law distinctions and was consistent with the practicalities of modern law enforcement and the purposes of the sentence-enhancement provision. 495 U.S. at 592-594.

The "natural and probable consequences" rule was an established feature of aiding and abetting at common law. See, *e.g.*, *People* v. *Robinson*, 715 N.W.2d 44, 49 (Mich. 2006); *State* v. *Richmond*, 90 S.W.3d 648, 654 (Tenn. 2002). As with the term "burglary" in 18 U.S.C. 924(e), Congress must have intended to include the common-law understanding of aiding and abetting in the generic definition of "theft offense" and

the other aggravated felonies in 8 U.S.C. 1101(a)(43). That would be true even if a majority of States had moved away from the "natural and probable consequences" rule or might do so in the future. Absent a situation in which federal law and the law of virtually all States had abandoned the common law at the time of enactment, the generic offense should, at a minimum, include what the common law covered.

b. In any event, a majority of the States have *not* moved away from the common-law rule; more States continue to apply the rule than have rejected it. Professor LaFave, who describes the "natural and probable consequences" rule as the "established" one, identifies nine States, in addition to California, that apply it: Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Tennessee, and Wisconsin. See LaFave § 13.3(b) at 361-362 nn.27-29 (2d ed. 2003 & Supp. 2007). Some version of the rule is also applied in twelve other States: Florida, Georgia, Idaho, Louisiana, Maryland, Michigan, Missouri, Nebraska, Rhode Island, South Carolina, Texas, and West Virginia.[1] Respondent contends (Br. 21-23) that at least 29 States (as well as the District of Columbia)

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[1] See, *e.g.*, *Beasley* v. *State*, 360 So. 2d 1275, 1278 (Fla. Ct. App. 1978) ("natural or probable consequence"); *Crawford* v. *State*, 435 S.E.2d 64, 65 (Ga. Ct. App. 1993) (same); *State* v. *Rodoussakis*, 511 S.E.2d 469, 488 (W. Va. 1998) (same); *State* v. *Ehrmantrout*, 595 P.2d 1097, 1097 (Idaho 1979) (per curiam) ("natural and probable consequence"); *Robinson*, *supra* (same); *State* v. *Leonor*, 638 N.W.2d 798, 807 (Neb. 2002) (same); *Hudgins* v. *Moore*, 524 S.E.2d 105, 108 n.5 (S.C. 1999) (same); *State* v. *Wiley*, 880 So. 2d 854, 864 (La. Ct. App.) ("foreseeable consequences"), writ denied, 885 So. 2d 585 (La. 2004); *Sheppard* v. *State*, 538 A.2d 773, 776 n.3 (Md. 1988) (conduct "in furtherance of the commission of the offense and the escape therefrom"); *State* v. *Evans*, 694 S.W.2d 860, 863 (Mo. Ct. App. 1985) (conduct that "defendant knew [of] or could reasonably anticipate"); *State* v. *Lambert*, 705 A.2d 957, 963-964 (R.I. 1997) ("natural, or reasonable, or probable consequences"); *Gordon* v. *State*, 640 S.W.2d 743, 758 (Tex. Ct. App. 1982) ("foreseeable, ordinary and probable consequences").

either have explicitly rejected the rule or have enacted statutes or issued judicial decisions that are inconsistent with it. That is not correct. The statutes and judicial decisions cited by respondent (Br. 22-23 nn.23-25) reflect that only the District of Columbia and 13 States—Alaska, Arizona, Colorado, Connecticut, Hawaii, Kentucky, Montana, Nevada, New Hampshire, New Mexico, Pennsylvania, Vermont, and Washington—can fairly be said to apply a rule that fundamentally differs from the "natural and probable consequences" rule. With respect to the remaining 16 States identified by respondent, the statutes and judicial decisions he cites do not specifically address the question whether a defendant can be liable under an aiding-and-abetting theory for an additional crime that is the natural and probable consequence of the crime he intended to facilitate or promote. And in several of those States, there are judicial decisions that do address that question, and explicitly *adopt* a version of the "natural and probable consequences" rule. See note 1, *supra*.

By our count, therefore, at least 22 jurisdictions apply the rule and no more than 14 have rejected it. In fact, the relevant split is even less favorable to respondent than that, because at least two of the jurisdictions that have rejected the rule did so only recently. See *Wilson-Bey* v. *United States*, 903 A.2d 818 (D.C. 2006) (overruling prior decisions); *Sharma* v. *State*, 56 P.3d 868 (Nev. 2002) (per curiam) (same). Those jurisdictions *applied* the rule at the time "theft offense" was added to the aggravated-felony provision, which, as respondent recognizes, is "[t]he most relevant time for determining [the] statutory term's meaning." Br. 31 n.36 (citation omitted). There is thus no basis, even under respondent's theory, for concluding that "generic" aiding and abetting excludes liability under a "natural and probable consequences" theory.

c. The federal courts of appeals have also applied the "natural and probable consequences" rule in cases involving the

federal aiding-and-abetting statute, 18 U.S.C. 2.[2] That is significant, because courts consider federal as well as state law in determining the "generic" definition of aggravated felonies.[3] Indeed, for at least two reasons, federal law should have *substantial* weight in determining what Congress included in the "generic" meaning of the aiding-and-abetting component of an aggravated felony.

First, construing "generic" aiding and abetting under the INA to be narrower than aiding and abetting under 18 U.S.C. 2 would attribute to Congress the quite anomalous intent to include aiding-and-abetting liability under a "natural and probable consequences" theory for purposes of the federal criminal laws but not for purposes of the federal immigration laws. It would mean that a person convicted of (for example) aiding and abetting a murder under that theory, see, *e.g.*, 18 U.S.C. 1111 (2000 & Supp. IV 2004), would be subject to the same criminal penalties as a principal, potentially including life in prison, but not to the same immigration consequences. It is highly unlikely that Congress intended such a result.

Second, if respondent's view were correct, *no* alien convicted of a federal murder, rape, burglary, theft, or fraud of-

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[2] See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 637 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 1240 (2003); *United States* v. *Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996); *United States* v. *Miller*, 22 F.3d 1075, 1078-1079 (11th Cir. 1994); *United States* v. *Moore*, 936 F.2d 1508, 1527 (7th Cir.), cert. denied, 502 U.S. 991 (1991); *United States* v. *Graeme*, 774 F.2d 106, 108 n.1 (6th Cir. 1985), cert. denied, 474 U.S. 1068 and 1069, and 475 U.S. 1017 (1986); *United States* v. *Barnett*, 667 F.2d 835, 841 (9th Cir. 1982); *United States* v. *DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971).

[3] See, *e.g.*, *Morales-Alegria* v. *Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) ("forgery" under 8 U.S.C. 1101(a)(43)(R)); *Ming Lam Sui* v. *INS*, 250 F.3d 105, 115 (2d Cir. 2001) ("attempt" under 8 U.S.C. 1101(a)(43)(U)); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 940 (7th Cir. 2001) ("sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A)); see also *In re V-Z S*, 22 I. & N. Dec. 1338, 1342 (B.I.A. 2000) (en banc) ("theft offense" under 8 U.S.C. 1101(a)(43)(G)).

fense (to name only a few) would be deemed an aggravated felon, see 8 U.S.C. 1101(a)(43)(A), (G) and (M)(i), unless the government could prove that the alien was not convicted as an aider and abettor under a "natural and probable consequences" theory. If that were so, a federal offense of that type would never be deemed an aggravated felony as a "categorical" matter, because every conviction under a federal statute might theoretically rest on such a basis, and a federal offense of that type would only rarely be deemed an aggravated felony under the "modified categorical" approach, because, as difficult as it would be to establish that an alien was not convicted as an aider and abettor, see U.S. Br. 22-24, it would be more difficult still to establish that he was not convicted under a particular theory of aiding and abetting. Indeed, under respondent's approach, it would be rare for an alien to be found to be an aggravated felon based on a conviction from *any* jurisdiction that applies the "natural and probable consequences" rule (including California, Florida, Illinois, and Texas, four of the most populous States). It is highly unlikely that Congress intended that result either, particularly since the overwhelming majority of aliens whose status as aggravated felons could not be established under respondent's rule would in fact be principal offenders or aiders and abettors of "target" rather than "second" crimes (Resp. Br. 17), and thus would indisputably qualify for that status.

B. Respondent Was Convicted Of A "Theft Offense" Regardless Of Whether The California Statute Covers Accessories After The Fact

Respondent also contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because (a) the California statute covers "accessor[ies]," Cal. Veh. Code § 10851(a) (West 2000); (b) "accessory" in that statute assertedly has the same meaning as in California Penal Code § 32 (West 1999), where

it means accessory after the fact; and (c) the generic definition of "theft offense" does not cover accessories after the fact. Br. 7-15; accord CPDA Amicus Br. 17-19. That contention likewise affords respondent no basis for relief.

1. In our opening brief, we pointed out that, even if Section 32 of the California *Penal* Code defined a term ("accessory") rather than identifying a separate substantive offense, it is not clear that the definition would apply in the California *Vehicle* Code. U.S. Br. 29. Respondent cites no decision holding that it does. In our opening brief, we also cited California authority that addresses the meaning of the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing," Cal. Veh. Code § 10851(a), and noted that that authority suggests that the phrase is merely shorthand for aider and abettor. U.S. Br. 29-30 & n.17. Respondent disparages that authority (Br. 13 & nn.12-13), but he does not cite any authority that offers a different interpretation of the statutory phrase.

Respondent's basic submission (Br. 8-13) is that "accessory" in Section 10851(a) of the Vehicle Code could only have the meaning that the term has in Section 32 of the Penal Code. But Section 10851(a) also refers to an "accomplice," which is defined in California Penal Code § 1111 (West 2004) as a particular type of trial witness (and in a manner that includes a principal), and to a "party," which, as far as we are aware, is not defined anywhere in California's criminal statutes. It is hardly unreasonable, therefore, to conclude that "accessory" is also used in a different sense in Section 10851(a), and that the three terms together are merely a formulation for including aiders and abettors, as the authorities we cite indicate.

As we explain in our opening brief (at 30-32), however, it is ultimately irrelevant whether Section 10851(a) reaches accessories after the fact. Even if it does, even if the statute on its

face is therefore broader than the generic definition of "theft offense," and even if a violation of Section 10851(a) is for that reason not a "theft offense" as a "categorical" matter, the government has still demonstrated that respondent was convicted of a "theft offense" under the "modified categorical" approach. That is because respondent was charged as a principal (Pet. App. 13a), and a defendant charged with a principal violation can be convicted of aiding and abetting (which is included in the generic definition) but not of being an accessory after the fact (which is not). See Gov't Br. 30-32.

2. Quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), respondent contends that a holding by this Court that he was convicted of a "theft offense" under the "modified categorical" approach would violate the "fundamental rule of administrative law" that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." Br. 40. Since the IJ and BIA apparently found that a violation of California Vehicle Code § 10851(a) is *categorically* a "theft offense," see Pet. App. 3a-10a, respondent urges the Court to "remand to the agency for consideration under the modified approach" (Br. 40). Respondent quotes *Chenery* selectively. The "fundamental rule of administrative law" identified in that case is not that a reviewing court *invariably* may sustain an agency decision only on the grounds invoked by the agency, but that it is so confined when "dealing with a determination or judgment which an administrative agency alone is authorized to make." 332 U.S. at 196. Here, whether the state crime of which respondent was convicted satisfies the federal definition of "theft offense" is not a determination that the BIA alone is authorized to make.

To begin with, that determination does not entail the exercise of any discretion granted to the agency. Nor, contrary to respondent's contention, does it entail "a highly fact-bound inquiry." Br. 41. Instead, in the circumstances of this case,

it presents a relatively unusual instance of a pure question of law, and one as to which a remand to the agency is not required. While deference is owed under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), to the BIA's interpretation of the term "theft offense" in the INA (because the BIA is charged with administering the INA), see pp. 17-18, *infra*, courts have not deferred to the BIA's determination that a particular state or federal offense satisfies the definition of "theft offense" (because the BIA is not charged with administering state or federal criminal laws), see, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 281 (4th Cir. 2005); *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176 (2d Cir. 2004), cert. denied, 126 S. Ct. 734 (2005). In many instances, the determination of whether a particular state or federal conviction is an aggravated felony will also require some interpretation of the INA's aggravated-felony provision, which should be left to the BIA in the first instance. In this case, however, it is conceded that the conduct of an accessory after the fact is not included in the generic definition of "theft offense," so no remand is required for that purpose. The Court can determine itself whether the charge in the information to which respondent pleaded guilty encompasses a theory of liability that is not covered by the generic definition of "theft offense."

3. Respondent contends (Br. 41-48) that, if the Court does apply the "modified categorical" approach, it should rule for him. He makes two alternative arguments in support of that claim. Each lacks merit

a. Respondent's first theory is that the rule that a defendant charged as a principal cannot be convicted as an accessory after the fact applies only in an "ordinary case" (Br. 43) and that this is not an ordinary case, because Section 10851(a) "expressly reaches accessories after the fact," thereby "eviscerating the distinction between accessories after the fact and principals" and "making the accessory liable for the substan-

tive crime" (Br. 44). That theory is erroneous. As respondent acknowledges (Br. 8), the crime of being an accessory after the fact is universally regarded as separate and distinct from the underlying offense, and there is no basis in law or logic for making applicability of that rule depend on whether the legislature chooses to place the accessory-after-the-fact provision in the same subsection as the underlying offense, in a separate subsection of the same statute, or in an entirely different statute. Assuming that "accessory" in California Vehicle Code § 10851(a) does mean accessory after the fact, the inclusion of the term no more makes an accessory after the fact to vehicle theft a principal than the inclusion of the term "conspires" in 18 U.S.C. 1951(a) abolishes the distinction between obstructing interstate commerce by robbery or extortion and conspiracy to commit that offense, such that a defendant charged with the substantive offense can be convicted of conspiracy, see *Callanan* v. *United States*, 364 U.S. 587 (1961) (holding that they are separate offenses).[4]

The sole authority on which respondent relies (Br. 44) is *People* v. *Prado*, 136 Cal. Rptr. 521 (Ct. App. 1977), which states that, "*in the absence of statute*, an accessory after the fact must be indicted and convicted as such, and * * * a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact." *Id.* at 523 (emphasis added; citation omitted). The obvious point of the italicized phrase, however, is merely that a legis-

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[4] Numerous federal statutes prohibit the substantive offense, conspiracy to commit the offense, and attempt to commit the offense in the same paragraph. See, *e.g.*, 18 U.S.C. 81 (Supp. IV 2004) (arson); 18 U.S.C. 115 (2000 & Supp. IV 2004) (kidnap or murder of federal official); 18 U.S.C. 1951(a) (Hobbs Act robbery or extortion); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2251(e) (Supp. IV 2004) (sexual exploitation of children). Yet it is clear under federal law that a substantive offense, a conspiracy, and an attempt are separate crimes. U.S. Br. 25 & n.14.

lature may provide by statute that an accessory after the fact *need not* "be indicted and convicted as such" and that, if a legislature does so provide, a person charged in an indictment as a principal *can* "be convicted on evidence showing him to be only an accessory after the fact." California Vehicle Code § 10851(a) does not so provide, even though the California Legislature has demonstrated that it knows how to write such a statute. See Cal. Penal Code § 971 (West 1985) ("no other facts need be alleged in any accusatory pleading against [an aider and abettor] than are required in an accusatory pleading against a principal").

b. Respondent's second theory is that California courts permit "informal, oral amendment of accusatory pleadings," such that the written information "may not be reflective of the actual information in place at the time of the plea"; that California courts also allow a guilty plea to "a crime that is different from that described in the written information without amending the information," as long as the crime is "reasonably related" to the charged crime; and that, accordingly, "one charged as a principal" under California Vehicle Code § 10851(a) "may, in fact, have pleaded guilty as an accessory after the fact." Br. 46-47. That theory is equally erroneous.

As an initial matter, the abstract of judgment in this case reflects that respondent pleaded guilty to the charge in count one of the information, which the abstract of judgment identifies as "auto theft" in violation of Section 10851(a). Pet. App. 11a. That document therefore demonstrates that respondent pleaded guilty to the crime with which he was charged, not to some other one.[5]

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[5] Respondent suggests (Br. 42 n.54) that courts may not rely upon an abstract of judgment in determining whether a California conviction is for an aggravated felony. But he did not object to the use of that document before the agency, and his claim has therefore been forfeited. See 8 U.S.C. 1252(d)(1). In any event, the INA explicitly provides that "[a]n abstract of a record of

Even if the language in the abstract of judgment were thought to be broad enough to encompass the possibility that respondent was convicted as an accessory after the fact (assuming Section 10851(a) reaches that offense), respondent's theory still would not be a viable one. If the mere possibility that an alien pleaded guilty to an offense other than the one reflected in the charging instrument were sufficient to defeat a finding of aggravated-felony status in a case in which the language in the judgment is broad enough to encompass both the charged offense and some other offense that is not an aggravated felony, producing the charging instrument and corresponding judgment in such a case would never be sufficient to establish that the alien was convicted of an aggravated felony. Under respondent's theory, for example, if an information charged the defendant with entering a house with intent to commit a felony in violation of the California burglary statute, Cal. Penal Code § 459 (West 1999), and the judgment reflected a plea to "burglary" in violation of that provision, the government would be unable to rely on those documents to establish that the defendant was convicted of generic burglary, see *Taylor*, 495 U.S. at 598-599, because it is theoretically possible that the defendant in fact pleaded guilty to entering a *vessel* with the intent to commit a felony (a non-generic burglary, see *id.* at 599, that is also covered by the statute), even though he was not charged with that offense. The government in such a case would presumably have to produce a "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." *Shepard* v. *United States*, 544 U.S.

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conviction" constitutes "proof of a criminal conviction" in removal proceedings, 8 U.S.C. 1229a(c)(3)(B)(v), and the Ninth Circuit has found a California abstract of judgment, in combination with the charging instrument, sufficient to establish the offense of which the alien was convicted, *e.g.*, *United States* v. *Velasco-Medina*, 305 F.3d 839, 852 (2002), cert. denied, 540 U.S. 1210 (2004).

13, 26 (2005). But plea colloquies do not always reflect the precise theory of liability; even when they do, they are not always transcribed; and even when they are, the transcripts are not always available. See U.S. Br. 23.

The consequence of respondent's theory, therefore, is to allow a mere theoretical possibility to render the *Taylor* framework wholly unworkable and allow a substantial number of aliens who are in fact aggravated felons to avoid being treated as such based on remote speculation. Congress could not have intended that result. The government and the courts should be entitled to presume that a charging instrument and corresponding judgment establish that the alien was convicted of the charged crime, and the alien should bear the burden of demonstrating that he *in fact* was convicted of a different crime. Because respondent was charged with "driv[ing]" or "tak[ing]" a vehicle, Pet. App. 13a, and he has produced no evidence that he instead pleaded guilty to being an accessory after the fact (or any other crime, for that matter), the record establishes that he was convicted of a "theft offense."

C. The Fact That The California Statute Covers Thefts In Which A Temporary Deprivation Is Intended Does Not Preclude A Finding That Respondent Was Convicted Of A "Theft Offense"

Respondent also contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because the California statute covers thefts in which the defendant intends to deprive the owner of his property temporarily and the generic definition of "theft offense" assertedly does not. Resp. Br. 27-39; accord CPDA Amicus Br. 5-14; Law Professors Amicus Br. 5-19. That contention is also mistaken.

1. As an initial matter, the contention is not properly before the Court. Respondent's claim regarding the proper

mens rea for a generic "theft offense" was not raised in his brief in opposition, and thus, in accordance with the Court's ordinary practice, it should be "deemed waived." Sup. Ct. R. 15.2.; see, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 240 n.3 (2004); *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002). Deeming the argument waived is particularly appropriate because "the Ninth Circuit did not address the[e] argument" below, *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004); see Pet. App. 1a-2a, and the absence of any circuit conflict on the issue, see p. 18, *infra*, means that it is not "of sufficient general importance to justify the grant of certiorari," *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975).

Nor should respondent's waiver be excused on the theory that the issue is "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980), and Sup. Ct. R. 14.1(a)). The question presented in this case is whether a generic "theft offense" includes aiding and abetting. Pet. I. The question of the appropriate mens rea for a generic "theft offense" by a *principal* may at some level be "related," or even "complementary," to that question, but "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not '"fairly included therein."'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992)); see also *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998); *Melendez* v. *United States*, 518 U.S. 120, 125 n.2 (1996).

Respondent contends that the government's argument in Point B of its opening brief has put the question of the appropriate mens rea element "directly at issue." Resp. Br. 29 n.33. The argument to which respondent refers, however, see U.S.

Br. 27-32, simply addresses the application of the legal rule the government advocates in Point A of its opening brief—that a "theft offense" includes aiding and abetting—to the circumstances of this case. It is quite difficult to see how that argument, which *is* fairly included within the question presented, could be thought to have opened the door to an argument about an entirely separate aspect of the generic definition of "theft offense."[6]

2. If the Court decides to address respondent's claim, it should be rejected. Respondent's basic submission is that "the brief taking of property with the intent to return it does not satisfy the mens rea requirement for a theft offense." Br. 31; accord Br. 38. The BIA, however, has interpreted "theft offense" in 8 U.S.C. 1101(a)(43)(G) to mean "a taking of property * * * [with] criminal intent to deprive the owner of the rights and benefits of ownership, *even if such deprivation is less than total or permanent*." *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1346 (B.I.A. 2000) (en banc) (emphasis added). Because the BIA administers the INA, its interpretation of that provision is "entitled to *Chevron* deference if reasonable," *Ming Lam Sui* v. *INS*, 250 F.3d 105, 113 (2001); accord *Soliman*, 419 F.3d at 281; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), whether or not the Court would have come to the same conclusion in the first instance, *Chevron*, 467 U.S. at

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[6] Respondent's argument that "generic" aiding and abetting does not include the "natural and probable consequences" rule was also not raised in the brief in opposition, but, unlike the mens rea argument, it *can* be said to be fairly included in the question presented, because it involves the scope of "generic" aiding and abetting and can therefore be regarded as "a predicate to the intelligent resolution" of the question presented. Conversely, respondent's argument that the California vehicle-theft statute reaches accessories after the fact *was* raised in the brief in opposition (at 17-26), but it probably *cannot* be said to be fairly included in the question presented. As explained above, however, see p. 10, *supra*, the Court can resolve the case by assuming without deciding that respondent's position on that issue is correct.

843 n.11. As the Second Circuit has correctly held, "the BIA's interpretation of 'theft offense' is reasonable." *Abimbola*, 378 F.3d at 176; see also *Jaggernauth* v. *United States Att'y Gen.*, 432 F.3d 1346, 1353 (11th Cir. 2005) (applying BIA definition). Indeed, the Seventh, Ninth, and Tenth Circuits have adopted an almost identical definition of "theft offense" based on a de novo interpretation of the INA. See *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1009 (7th Cir. 2001); *United States* v. *Vasquez-Flores*, 265 F.3d 1122, 1125 (10th Cir. 2001), cert. denied, 534 U.S. 1165 (2002); *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc). And, as far as we are aware, no court of appeals has adopted respondent's proposed definition.

The BIA's conclusion—that, even if the common-law definition of "larceny" requires an intended *permanent* deprivation, the statutory definition of "theft offense" does not, see *In re V-Z-S-*, 22 I. & N. Dec. at 1341-1346—reflects a permissible interpretation of the INA for a number of reasons. First, as the Seventh Circuit observed in adopting a definition of "theft offense" similar to the BIA's, "'theft' encompasses many crimes, which indicates that any definition ought to be broad." *Hernandez-Mancilla*, 246 F.3d at 1008; see *United States* v. *Turley*, 352 U.S. 407, 414 (1957) ("theft" is "generally considered to be broader than 'common-law larceny'"). Second, as the en banc Ninth Circuit observed in adopting the Seventh Circuit's definition, "Congress used the words 'theft offense' rather than just 'theft,' thus indicating that the phrase ought [to] be read to incorporate different but closely related constructions in modern state statutes." *Corona-Sanchez*, 291 F.3d at 1205; accord *Hernandez-Mancilla*, 246 F.3d at 1008 ("by choosing the words 'theft offense' rather than just 'theft,' * * * Congress indicated that the phrase ought to be given a

broad read").[7] Third, as the BIA itself observed, terms such as "steal" and "embezzle" in federal criminal statutes have long been interpreted *not* to require an intent to deprive the owner of his property permanently, *In re V-Z-S-*, 22 I. & N. Dec. at 1343-1344 (discussing 18 U.S.C. 641, 661, 2312 and 2313), and it would be anomalous if Congress had intended that some federal theft crimes would not constitute a "theft offense" under the INA, see *id.* at 1345 n.8.

A violation of the California vehicle-theft statute is a "theft offense" because the mens rea element in the statute is no broader than that in the BIA's definition. The California statute requires "intent either to permanently or temporarily deprive the owner * * * of his or her title to or possession of the vehicle," Cal. Veh. Code § 10851(a); the INA as interpreted by the BIA requires "criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent," *In re V-Z-S-*, 22 I. & N. Dec at 1346. Respondent suggests that the phrase "less than total or permanent" can be understood to "cover[] intent to effect certain non-permanent deprivations—*i.e.*, those that appropriate a major portion of the economic value of the property taken—but exclude[] brief or momentary de-

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[7] Many States (in addition to California) have statutory offenses that involve a taking of property with the intent to deprive the owner of the property temporarily. See, *e.g.*, Kan. Stat. Ann. § 21-3705 (Supp. 2004) (criminal deprivation of property); La. Rev. Stat. Ann. § 47:818.36 (2006) (unlawful use of tax collected); Mo. Ann. Stat. § 411.770 (West 2001) (stealing grain); N.C. Gen. Stat. § 14-82 (2005) (taking horses, mules, or dogs for temporary purposes); Okla. Stat. Ann. tit. 47, § 4-102 (West 2000) (unauthorized use of vehicle or implement of husbandry); Utah Code Ann. § 76-6-404.5 (2003) (wrongful appropriation); Va. Code Ann. § 18.2-58.1 (2004) (carjacking); Vt. Stat. Ann. tit. 13, § 3833 (1998) (unlawful taking of tangible personal property); W. Va. Code Ann. § 29-2A-13 (LexisNexis 2004) (unauthorized taking or operation of aircraft); Wyo. Stat. Ann. § 6-5-110 (2005) (wrongful appropriation of public property).

privations with an intent to return" (Br. 39 n.50), in which case the California statute would be broader than the generic definition. But such an understanding is foreclosed by the fact that, in the very case in which it adopted a definition of "theft offense" that includes the phrase, the BIA determined that the California vehicle-theft statute satisfies the definition. See 22 I. & N. Dec. at 1346-1352. It could not have reached that conclusion if respondent's suggested understanding of the phrase were correct.[8]

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2006

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[8] Respondent also suggests that a violation of Section 10851(a) cannot be a "theft offense" because, in the case in which the BIA adopted the definition of that term, it "suggested that joyriding is not a theft offense," and joyriding in California "is punishable—and only punishable—under § 10851." Br. 38-39 n.49. At the time of the conviction under consideration in the BIA case, however, joyriding was punishable under California Penal Code § 499b (West 1995), which, unlike Section 10851(a), required a specific "intent to use or operate another's vehicle without the owner's consent" but did not require an "intent to deprive the owner of his property," *In re V-Z-S*, 22 I. & N. Dec. at 1348, a distinction stressed by the California Supreme Court, see *id.* at 1349 (citing *People* v. *Thomas*, 373 P.2d 97, 101 (Cal. 1962), appeal dismissed and cert. denied, 371 U.S. 231 (1963)). Insofar as the BIA suggested that joyriding is not a "theft offense," therefore, it was referring only to a joyriding conviction under Section 499b. See *id.* at 1348-1349; cf. *United States* v. *Perez-Corona*, 295 F.3d 996, 1001 (9th Cir. 2002) (holding that violation of Arizona joyriding statute is not "theft offense" because it does not require *any* "intent to deprive the owner of his property").

APPENDIX

8 U.S.C.1101(a)(43) (2000 & Supp. IV 2004) provides:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficing crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)

for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information),

2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[;]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which

the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15

years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.